In the United States Bankruptcy Court
for the
Southern District of Georgia
Savannah Division

In the matter of:	)	
	)	
JUDY DACUS BARBER a/k/a Shilo Ann Barber	)	Chapter 13 Case
	)	Number 90-41331
Debtor	)	
	)	
and	)	
	)	
ROGER BRITTON MOBLEY RENA ELLIS MOBLEY	)	Chapter 13 Case
	)	Number 90-40064
Debtors	)	

MEMORANDUM AND ORDER
ON MOTIONS TO PAYOFF CHAPTER 13
AND APPLICATION FOR DISCHARGE

Debtors in the above-captioned cases filed similar motions seeking authority to tender to the Chapter 13 Trustee the balance of all future payments remaining under the terms of their confirmed Chapter 13 plans in a lump sum and seeking a determination that the Court would thereafter enter an Order granting the Debtors a Chapter 13 discharge.

Because the cases present identical issues of fact and law they are consolidated for purposes of this opinion.

FINDINGS OF FACT
JUDY DACUS BARBER

Debtor's case was filed July 19, 1990, and proposed payment of $383.00 semi-monthly for sixty months resulting in a projected percentage dividend to unsecured creditors in the amount of 100%. The plan was confirmed after a hearing on December 12, 1990, as a sixty-month, 100% case. On February 10, 1992, Debtor filed a modification of her plan proposing that the 100% dividend be modified to provide only a composition payout to creditors. After a hearing conducted on March 27, 1992, the modification was confirmed reducing the payments to $75.00 semi-monthly based on Debtor's then amended budget and provided a dividend to unsecured creditors to 10.89% over the remaining life of the plan of thirty-five months.

On April 19, 1994, Debtor's Motion to Payoff Chapter 13 and Request for Entry of Discharge recited "the Debtor is now in a position to payout the balance of her Chapter 13 confirmed plan. The payoff is a little more than $1,000.00." In the same motion the Debtor recited that her desire to payout her Chapter 13 plan arose from the fact that she wished to refinance the residence in which she lives, that a lower

rate of interest is available which would significantly reduce her monthly payments and that her inability to refinance would jeopardize her ability to retain her home as well as jeopardize her ability to make future payments to the Chapter 13 Trustee.

The Trustee filed a response to the Debtor's Motion opposing her request to incur debt to refinance her home and the matter was scheduled for a hearing on May 19, 1994. At that time, it was revealed that the Debtor had a source from which she could borrow the money to "payout the balance" in her case. The Trustee objected to the payoff of the case asserting that the creditors of the estate should be entitled to share in the benefit of the Debtor's reduced living expenses which will result in higher disposable income after her monthly house payment is reduced. No opposition to the Debtor's proposal to refinance her home was asserted at that time and by an Order entered on May 23, 1994, I approved that refinancing. In connection therewith, the Debtor revealed that her home was appraised at $84,000.00, that the total amount she is refinancing is approximately $63,000.00, that the home is titled in her name and that of her spouse, who is not a debtor, and as a result the Debtor has approximately $10,500.00 equity in her home.

FINDINGS OF FACT
ROGER BRITTON AND RENA ELLIS MOBLEY

Debtors' case was filed on January 11, 1990. The plan proposed payments of $95.00 bi-weekly for sixty months resulting in a pro-rata distribution to unsecured creditors in an undisclosed amount. Debtors' case was set for confirmation hearing on May 23, 1990, and was confirmed at that time generating a dividend of approximately 33% to the unsecured creditors. After the hearing on confirmation it was discovered that a claim in the amount of $2,500.00 filed by the Internal Revenue Service had been incorrectly disallowed under the belief that it had been filed after the bar date. When it was discovered that it had been timely filed, the Trustee recommended that the claim be allowed and the dividend reduced accordingly. Based on the Trustee's recommendation, an Order Confirming the Plan effective May 23, 1990, was entered paying a dividend of approximately 7% to the unsecured creditors.

On April 12, 1994, the Debtors filed a Motion to Approve Payout of their Chapter 13 Case and an Application for Discharge alleging that the plan as confirmed would pay a 7.7% dividend to unsecured creditors and that "due to a large unexpected income tax refund, the Debtors are able to conclude their plan by paying the balance due at this time."

At the hearing conducted on May 19, it was revealed that the Debtors' case had been pending approximately forty-seven months since the date of confirmation; that the Debtors had received State and Federal income tax refunds for the tax year 1993 of approximately $1,300.00 and that the remaining balance to paid out over the final thirteen months of their plan as confirmed is approximately $1,400.00. It was further revealed that the Debtors wish to immediately tender the amount which would otherwise be paid over the remaining thirteen months out of the proceeds of their tax refund in order to obtain immediate discharge.

CONCLUSIONS OF LAW

In both cases, it was stipulated that no grounds for seeking a modification of Debtors' cases exist and that the matter should be decided purely upon the question of whether the Debtors are entitled to a discharge under 11 U.S.C. Section 1328 because they propose to pay, in advance, all the remaining monthly payments required by the terms of the order confirming their plans, or whether Debtors must continue to pay, on a monthly basis, the payments called for in the plan, for the duration of the plan as confirmed.

In each case, the Debtor points out that the plans have been pending

for more than thirty-six months. Under 11 U.S.C. Section 1322(c), a plan may not provide for payments over a period that is "longer than three years unless the court, for cause, approves a longer period, but the court may not approve a period that is longer than five years." In each case, Debtors requested the Court to approve a plan which contemplated payment over the full five year period permitted under this section, but now seek to shorten the period of the plan, though not the dollar amount of payments it provided.

Pursuant to the terms of 11 U.S.C. Section 1327, the provisions of a confirmed plan bind the "debtor and each creditor." While there are provisions allowing modification of plans, found in 11 U.S.C. Section 1329, which permit either an increase or reduction in the proposed payments and an extension or reduction in the time during which said payments are required, I find that Debtors' motions are not well-founded and will be denied. It is true that debtors cannot be compelled to propose a plan which extends beyond thirty six months, but debtors are free to elect a five year plan. In a vast majority of cases filed in this District, debtors make such an election presumably because the financial burden of paying the secured and priority claims and an acceptable dividend to unsecured creditors is more than debtors can afford to undertake to do within a three-year period. When the plan is confirmed

providing for payments over a sixty month period, I conclude that Section 1327 is binding on the debtor and mandates, in order for the discharge to be entered under Section 1328, that the debtor must continue the monthly payments called for in the plan for the full sixty month period. In the event debtor can establish legally sufficient grounds for a modification, of course, the duration of the plan can be reduced, or a decrease in the monthly payments may be permitted. 11 U.S.C. §1329. However, any downward modification is dependent on circumstances which occur after the date of confirmation and prior to the expiration of the thirty six or sixty month plan as the case may be.

The rationale for also permitting upward modifications should be self-evident. Debtors' plans, as originally confirmed or as modified, provide for an extremely low dividend to the unsecured creditors. In the Barber case, Debtor resides in a parcel of real estate in which there is $21,000.00 equity and with respect to which she owns a one-half undivided interest. It is not clear whether at the time of confirmation of her plan the equity in her residence was the same as presently exists or not. Presumably it did not or the plan could not have been confirmed as it would have violated the provisions of 11 U.S.C. Section 1325(a)(4), which provide that unsecured creditors must receive not less than what they would have been paid on

their claims had there been an orderly Chapter 7 liquidation of the debtor's estate. With what appears to be approximately $10,000.00 in equity available to this Debtor and with unsecured claims totalling $28,000.00 in her case, her plan could not have been confirmed at a ten percent dividend paying approximately only $3,000.00 *in toto* to the unsecured creditors. However, at the time her case was filed she scheduled the value of her residence at $72,000.00. Thus, at the time of confirmation neither the Trustee, nor her creditors nor the Court were aware of the fact that her equity might be substantially higher, as it apparently is today. As a result of the present equity position, Mrs. Barber would likely be unable to obtain approval of a modified plan because, upon presentation of the issue of modification to the Court, the Court is required to analyze it under the same criteria applicable to confirmation of original plans, and the modification would not meet the liquidation analysis burden. *See* 11 U.S.C. §§1329(b) and 1325(a)(4).

Similarly, in the Mobley case, the fact that the Debtors have received a substantial refund from State and Federal taxing authorities with jurisdiction over their income strongly suggests that the disposable income available to their family has increased since the time of confirmation. Debtors are required to file budgets in Chapter 13 cases showing their total income and their total expenditures and the

difference in the two is utilized by the Trustee in determining whether the debtors meet the requirements of 11 U.S.C. Section 1325(b)(1)(B), which requires that the plan must devote all debtor's projected disposable income for a three-year period to payments under the plan. The Mobleys' budget at confirmation did not reveal any anticipated tax refunds coming into their possession, and the plan was confirmed at a very low rate of return to unsecured creditors on that premise. Now the Debtors have received, for the tax year 1993, at least, and possibly with respect to other years during which their plan has been pending, a "large unexpected income tax refund." Interestingly, Debtors in this case owe approximately $9,800.00 in unsecured claims and the 7.7% dividend would yield a projected total payout of all unsecured claims of only $765.84. If the $1,300.00 tax refund is, contrary to the Debtors' desire, treated as disposable income and disbursed to unsecured creditors, the creditors, as a result of that one lump sum payment, will receive nearly twice as much in distributions as that to which they would have been entitled under the terms of the confirmed plan.

Accordingly, it appears that grounds may exist under Section 1329 for the Trustee or another party in interest to seek to modify the plans in each case to increase the dividend to unsecured creditors. In this context, to grant either Debtor's Motion and permit a "payout" at this time would impermissibly modify the terms of

their confirmed plans without applying the procedural safeguards of Section 1329, and would deprive creditors of their rights to seek an increase in payments at anytime during the life of the plan. That result is contrary to the Code and cannot be approved.

In conclusion, Debtors' Motions will be denied because the effect of the confirmation order is not simply to require Debtors to pay a sum certain over whatever interval of time the Debtor later finds convenient, but rather to commit the Debtors' future income and other property of the estate to the supervision of the Court for the full period of time for which the plan has been confirmed. Any proposal to "payoff a case" in a lump sum is not legally sustainable, independent of a showing that grounds for a modification exist. The only procedure for modification is to file a modified plan, subject to full scrutiny and review of the Trustee and all creditors, and to carry the evidentiary burden at a confirmation hearing.

ORDER

Pursuant to the foregoing Findings of Fact and Conclusions of Law, IT IS THE ORDER OF THIS COURT that the Motions are denied. The

Trustee is directed to pursue such remedies as may be in the best interest of creditors.

Lamar W. Davis, Jr.
United States Bankruptcy Judge

Dated at Savannah, Georgia

This 3rd day of June, 1994.